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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
6 RENO, NEVADA

7 UNITED STATES OF AMERICA ) 3:94-CR-00044-ECR-RAM  
8 )  
9 Plaintiff, )  
10 vs. ) Order  
11 )  
12 ROBERT JACKSON )  
13 Defendant. )  
14

I. Background

15 In 1996, Defendant was convicted of Conspiracy to Distribute  
16 Cocaine Base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and  
17 Distribution of a Cocaine Base, in violation of 21 U.S.C. § 841(a).  
18 This Court sentenced Defendant to 360 months for conspiracy and 120  
19 months for distribution, to run concurrently. The Ninth Circuit  
20 Court of Appeals affirmed Defendant's sentence and conviction in  
21 United States v. Jackson, et al., 141 F.3d 1181 (9th Cir. 1998).

22 On February 22, 2001, Defendant filed his first petition under  
23 28 U.S.C. § 2255. After Plaintiff filed its opposition, this Court  
24 denied Defendant's petition on June 6, 2001.

25 On February 3, 2011, Defendant filed a Petition to Reopen his  
26 Writ of Habeas Corpus (#1294) under 28 U.S.C. § 2255.  
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1 On February 22, 2011, Plaintiff filed the Government's Response  
2 to Defendants' Second or Successive Petition Pursuant to Title 28,  
3 U.S.C. § 2255 (#1296).

4 On March 11, 2011, Defendant filed a reply (#1297) to the  
5 Government's response.

6 On March 17, 2011, this Court issued a minute order (#1298)  
7 denying Defendant's Petition to Reopen his Writ of Habeas Corpus  
8 (#1294) on the grounds that the Government's argument that Defendant  
9 did not obtain a Certificate of Appeal to file his Petition (#1294)  
10 was well taken.

11 On April 5, 2011 Defendant filed a motion (#1302) for  
12 reconsideration, contending that his Petition to Reopen (#1294)  
13 should not be considered a second or successive petition pursuant to  
14 28 U.S.C. § 2255 because his claim under the Fair Sentencing Act of  
15 2010 was not ripe at the time of his first § 2255 petition.

## 16 II. Discussion

17 28 U.S.C. § 2255(h) provides that a second or successive motion  
18 under 28 U.S.C. § 2255 must be certified as provided in 28 U.S.C. §  
19 2244 by a panel of the appropriate court of appeals to contain  
20 either (i) newly discovered evidence; or (ii) a new rule of  
21 constitutional law, made retroactive to cases on collateral review  
22 by the Supreme Court, that was previously unavailable.

23 Here, Defendant has not received a Certificate of Appeal from  
24 the Ninth Circuit Court of Appeals with respect to his second motion  
25 under 28 U.S.C. § 2255. Defendant's motion (#1302) for  
26 reconsideration fails to recognize that it is not this Court that  
27 will determine whether his Petition to Reopen (#1294) shows that his  
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1 claim relies on a new rule of constitutional law pursuant to 28  
2 U.S.C. § 2255(h), but the Ninth Circuit Court of Appeals that will  
3 do so in granting or denying Defendant a Certificate of Appeal.

4 Because Defendant has not received a Certificate of Appeal with  
5 respect to his Petition to Reopen (#1294), this Court may not  
6 properly consider Defendant's Petition.

7 Finally, we note that case law indicates that the changes to  
8 the sentencing guidelines rendered by the Fair Sentencing Act do not  
9 have retroactive effect. United States v. Hall, 2010 WL 4561363 at  
10 \*3 (9th Cir., Nov. 10, 2010); United States v. Williams, 2010 WL  
11 5297179 at \*6 (1<sup>st</sup> Cir., Dec. 28, 2010). As such, even if Defendant  
12 obtained a Certificate of Appeal from the Ninth Circuit Court of  
13 Appeals, it appears that the Fair Sentencing Act's lack of  
14 retroactivity would preclude relief.

15 **III. Conclusion**

16 Because Defendant has not received a Certificate of Appeal with  
17 respect to his Petition to Reopen (#1294), this Court may not  
18 properly consider Defendant's Petition.

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20 **IT IS, THEREFORE, HEREBY ORDERED** that Defendant's motion  
21 (#1302) for reconsideration is DENIED.

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23 DATED: April 7th, 2011.

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26 UNITED STATES DISTRICT JUDGE